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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 95

HOOVER MOTOR EXPRESS CO., INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR RE-HEARING

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Pursuant to the provisions of Rule 33 Petitioner, Hoover Motor Express Co., Inc., most respectfully files this, its Petition for Re-Hearing, in the above case.

Petitioner most respectfully insists that the opinion of this Court is clearly erroneous for the following reasons:

In the penultimate paragraph of the Court's opinion, the Court states:

"The violations usually resulted from a shifting of the load during transit, but there is nothing in the record to indicate that the shifting could not have been controlled merely by tying down the load or compartmentalizing the trucks. Other violations occurred because petitioner relied on the weight stated in the bill of lading when picking up goods in small communities having no weighing facilities. It would seem that this situation could have been alleviated by carrying a scale in the truck."

The opinion of the District Court (R. 12) states:

"In the view which the Court takes of the case, it is not necessary to determine whether the plaintiff did

all which should reasonably be required of it as a prudent operator to comply with the weight limitations involved. Assuming that it took every precaution that could fairly be demanded consistent with a practical operation of its business, . . .

Since the District Court did not make any finding of fact regarding the precautions which Petitioner took because it based its decision upon the assumption that it did in fact take all reasonable precautions, the record in the District Court was not included in the record on appeal and this Court, therefore, did not have before it the transcript of the evidence. In spite of this, however, the Court in its opinion now says there is no evidence that Petitioner could not have prevented shifting of weight during transit by tying down the load or compartmentalizing the trailer. The proof in the District Court clearly establishes that it is impossible to tie down or otherwise prevent some shifting of weight within the trucks because the size, shape and condition of the packages of freight involved are never the same. The proof also shows that the shipments within the shipping crates themselves can and at times do shift sufficiently to cause axle violations in cases where the truck was required to make a sudden stop.

The Court also states that there is no reason why Petitioner could not equip its trucks with scales. Here again the Court is assuming a fact which is contrary to the proof in the case. The proof clearly shows that it is impossible to equip trucks with scales to weigh all freight as it is picked up for the simple reason that the scales would have to be such to accommodate shipments weighing only a few pounds, as well as shipments weighing several thousand pounds. To equip trucks with scales that would accurately weigh packages, under these circumstances would leave no

room on the truck for freight. This also is a matter which should be first determined by the tryer of the facts, namely, the District Court.

Certainly it is not the prerogative of this Court to make initial findings of fact in this case, but if it decides to do so, Petitioner most earnestly insists that it is entitled to have the Court consider the evidence in the case.

If the District Court, or even this Court, should find from the evidence in the case that Petitioner did not in fact take all reasonable precautions, then the conclusion contained in the last paragraph of the Court's opinion would be justified, because the Petitioner not having done all that could reasonably be done to comply with State laws would thereby be encouraged to commit future violations. If, however, as assumed by the District Court, the Petitioner took every precaution that could fairly be demanded, then the allowance of the expenses claimed could not frustrate the enforcement of the State Acts because it would not and could not have any effect on future violations.

Petitioner most respectfully insists that this Court must have based its findings that the allowance of the fines would frustrate the enforcement of State Acts upon the earlier finding that the record failed to show that Petitioner could not have prevented shifting of weight by tying the loads or compartmentalizing the trailers. Certainly, if the facts clearly establish that these things cannot be done, as suggested by the Court, then the conclusion reached by the Court with reference to frustration would necessarily be incorrect.

During the oral argument of the case the Solicitor General argued that the Petitioner could have done certain things to have prevented the shifting of freight. This matter was not included in the briefs because Petitioner understood, and still believes, that the cause should be disposed of on the facts assumed by the District Court. The Court

may recall that Petitioner's counsel was not permitted any rebuttal time to answer these oral arguments because counsel in the companion case, Tank Truck Rentals, Inc., inadvertently used all of Petitioner's time, although Petitioner's counsel had expressly reserved time for rebuttal.

In conclusion, this case is entirely different from the companion case, Tank Truck Rentals, Inc., because in that case admittedly the carrier made no effort to comply with the State Weight laws and certainly under those circumstances the allowance of the fines as a deductible expense would frustrate the enforcement of the State Acts, *because such allowance would encourage future violations*. This situation does not exist in this case.

Since the facts upon which the Court based its opinion are contrary to the facts in the case, Petitioner most respectfully insists that the opinion of the Court is erroneous and the case should be remanded to the District Court, with instructions for that Court, as the original trier of the facts, to make specific findings as to whether Petitioner did in fact take every precaution that could fairly be demanded in its efforts to comply with the various State Weight laws. If this Court desires to make the finding initially, then Petitioner prays that this Court order the District Court to certify the transcript of the evidence in the case so that the Court may make its findings of fact upon the evidence.

Respectfully submitted,

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